

### **REMARKS**

Reconsideration and allowance of the subject application are respectfully requested. Applicants thank the Examiner for total consideration given the present application. Claims 1-29 were pending prior to the Office Action. Claims 30-31 have been added through this reply. Claim 28 has been canceled without prejudice or disclaimer of the subject matter included therein. Therefore, claims 1-27, and 29-31 are pending. Claims 1, 29, and 31 are independent. Applicants respectfully request reconsideration of the rejected claims in light of the remarks presented herein, and earnestly seeks a timely allowance of all pending claims.

### **OFFICIAL ACTION**

#### **Preliminary Comments**

##### **Amendment to the Specification**

Applicants have amended the title of the application to read "A Communication Device, Method and a Recording Medium for Selecting a Physical Layer Available for Each Application" as required by the Office Action.

##### **Office Action Not Sufficient**

It is respectfully submitted that when a cited reference, used as a basis to reject one or more claims, is complex or shows or describes inventions other than that claimed, the particular part of the cited reference relied upon must be designated nearly as practicable. The pertinence of each reference, if not apparent, must be clearly explained and each rejected claim specified. *See 37 C.F.R. § 1.104(c)(2)*. The Office Action fails to satisfy this standard.

In this instance, claims 1-29 were rejected under 35 U.S.C. § 102 (e) as being allegedly anticipated by Ueda, Sayers, and Schein. The action states that cited references "anticipates" the claims, referring simply to an entire page(s) of the disclosures. The only accompanying statements were to direct Applicants to review an entire page(s) of the disclosures.

A mere reference to the disclosures does not explain how the reference is relied upon as required by Rule 104(c)(2).

It is respectfully requested that the Examiner fully explained how particular parts of the cited references teach each and every limitation of the claims. Also, when claim interpretation is used, a mere citing of pages of a certain disclosure is not helpful to understand the position of the Examiner.

#### **Claim Rejection - 35 U.S.C. § 101**

The Examiner rejected claims 28 and 29 asserting that claims are not directed to statutory subject matter. By this amendment, Applicants have amended claim 29 to recite a “machine-readable medium having instructions stored thereon...” and have canceled claim 28. As such, Applicants respectfully submit that claim 29 is directed to statutory subject matter. Based on these amendments, it is respectfully requested that the outstanding rejection be withdrawn.

#### **Claim Rejection - 35 U.S.C. § 102(e)**

Claims 1-29 stand rejected under 35 U.S.C. § 102(e) as being allegedly anticipated by Ueda et al. (U.S. Patent Publication No. 2004/0193647), Sayers et al. (U.S. Patent Publication No. 2004/0048613), and Schein et al. (U.S. 2003/0133426). Applicants respectfully traverse these rejections.

For a Section 102 rejection to be proper, the cited reference must teach or suggest each and every claimed element. *See M.P.E.P. 2131; M.P.E.P. 706.02.* Thus, if the cited reference fails to teach or suggest one or more elements, then the rejection is improper and must be withdrawn.

#### **Argument A) Ueda is not an available reference under 35 U.S.C. § 102(e):**

The Examiner cites the Ueda publication under 35 U.S.C. § 102(e); however, the Ueda publication does not have a 102(e) date because the International Application no. PCT/JP2002/006827 (Publication no. WO/2003/007594) was not published in the English

language. See MPEP 2136.03. Therefore, the outstanding 35 U.S.C. § 102(e) rejection over the Ueda publication should be withdrawn.

**Argument B) Features of claims not taught by Ueda, Sayers, or Schein:**

The object of Ueda is to provide an apparatus that permits easy and convenient use of an AV data displaying/reproducing apparatus when it is controlled wirelessly via an AV data receiving apparatus by infrared remote control (paragraph 7). Further, Ueda describes that the user selects one of three grades by quality change setter 20, and after the quality is set, bandwidth used for communication is accordingly reduced (paragraph 51).

The object of Sayers is to provide a wireless network that employs a dynamically changing topology to accommodate user mobility and that is also capable of accepting and handling heterogeneous user traffic from multiple devices in a more efficient manner (paragraph 7). Further, Sayers describes JMRU 12 includes two types of high and width radio, on is for long range relay communication and the other for short range (paragraph 20).

The object of Schein is to reduce the interference caused by the broadcast channel (paragraph 8). Further, Schein describes selecting random access channels to be assigned to user terminals (paragraph 9). Schein also discloses a SDMA processor uses the received signal measurements 44 to select a channel for a connection (paragraph 23).

One example of the object of the present invention is to provide a communication device that permits each application layer to communicate using an optimal physical layer at current communication state irrespective of changes in the communication state of respective plurality of physical layers with time and changes in communication quality level with time of each physical layer (i.e. see last paragraph, page 3), which is different from those of the cited references.

Applicants have amended independent claims merely to further clarify the invention in order to move prosecution forward. Based on the amended claim 1, as described in Paragraph 1, page 5 of the English specification, the present invention may achieve the effect that “even when a communication state of each physical layer changes with time, and the communication quality level of each physical layer changes with time accordingly, it is still possible to select an optimal

physical layer that permits each application to communication in the current communication state.”

Ueda, Sayors, and Schein do not show or suggest the subject matter amended in independent claim 1, and claim 1 as amended is submitted to be allowable over Ueda, Sayors, and Schein for at least this reason.

Independent claims 29 and 31 are allowable for similar reasons as set forth above in reference to independent claim 1.

Dependent claims 2-27 and 30 are allowable for the reasons set forth above with regards to claim 1 at least based on their dependency on claim 1.

Accordingly, Applicants respectfully request that the Examiner reconsider and withdraw the rejection of claims 1-27 and 29-31 and under 35 U.S.C. § 102(e).

Reconsideration and allowance of claims 1-27 and 29-31 are respectfully requested for at least these reasons.

#### Conclusion

Therefore, for at least these reasons, all claims are believed to be distinguishable over the cited references, individually or in any combination. It has been shown above that the cited references, individually or in combination, may not be relied upon to show at least these features. Therefore, claims 1-27 and 29-31 are distinguishable over the cited references.

In view of the above amendments, it is believed that the pending application is in condition for allowance.

Applicants respectfully request that the pending application be allowed.

Should there be any outstanding matters that need to be resolved in the present application, the Examiner is respectfully requested to contact Aslan Ettehadieh Reg. No. 62,278 at the telephone number of the undersigned below, to conduct an interview in an effort to expedite prosecution in connection with the present application.

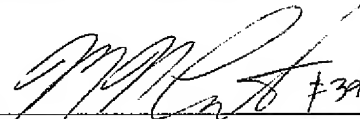
Application No. 10/829,280  
Amendment dated September 5, 2008  
Reply to Office Action of June 6, 2008

Docket No.: 1248-0716PUS1

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fees required under 37.C.F.R. §§1.16 or 1.147; particularly, extension of time fees.

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Respectfully submitted,

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